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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 801

EDWIN S. DOUGLAS,

*Petitioner,*

*vs.*

FAY H. DOUGLAS,

*Respondent.*

**Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.**

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## SUBJECT INDEX


PAGE

Opinions below ..... 1

Jurisdiction ..... 2

Treaty involved ..... 2

Statement ..... 3

Reasons for granting the writ ..... 5

I.

The California District Court of Appeal has decided an important question of the effect of a federal treaty which has not been, but should be, determined by this court ..... 6

II.

The California District Court of Appeal has decided an important question relating to the effect of a federal treaty in such a way as to nullify the force and effect of the treaty ..... 8

Conclusion ..... 12

Appendices:

Appendix A. Opinion of the District Court of Appeal ..... App. p. 1

Appendix B. Memorandum Opinion of the Superior Court of the State of California dated December 17, 1956 ..... App. p. 14

Appendix C. Memorandum of the Superior Court of the State of California dated January 3, 1957 ..... App. p. 18

## TABLE OF AUTHORITIES CITED

### CASES


| | PAGE |
|---|---|
| Cardinale v. Cardinale, 8 Cal. 2d 762, 68 P. 2d 351 | 9, 10, 11 |
| DeYoung v. DeYoung, 27 Cal. 2d 521, 165 P. 2d 457 | 9, 10, 11 |
| Durley v. Mayo, 351 U. S. 277 | 10 |
| Esewei v. Pennsylvania, 325 U. S. 279 | 9 |
| Estin v. Estin, 334 U. S. 541 | 9 |
| Lewis v. Lewis, 49 Cal. 2d 389, 318 P. 2d 987 | 9 |
| Missouri v. Holland, 252 U. S. 416 | 7 |
| Rediker v. Rediker, 35 Cal. 796, 221 P. 2d 1 | 10 |
| Sutton v. Leib, 342 U. S. 402 | 9 |
| Vanderbilt v. Vanderbilt, 354 U. S. 416 | 9 |
| Williams v. Kaiser, 327 U. S. 471 | 10 |
| Williams v. North Carolina, I, 317 U. S. 287 | 8 |
| Williams v. North Carolina, II, 325 U. S. 226 | 8, 11 |


### STATUTES


| | |
|---|---|
| Status of Aliens Treaty (46 Stat. 2753) | 2, 6 |
| Status of Aliens Treaty, Arts. 2, 5 (46 Stat. 2754) | 2, 6 |
| United States Code, Title 28, Sec. 1257(3) | 2 |
| United States Constitution, Art. IV, Sec. 1 | 7 |
| United States Constitution, Art. VI, Clause 2 | 7 |


### TEXTBOOKS


| | |
|---|---|
| 33 California State Bar Journal, pp. 15, 20, Sumner, Effect in California of Mexican Divorces | 8 |
| 58 Harvard Law Review, pp. 930, 1003-1004, Powell, And Repent at Leisure | 10 |
| 13 Southern California Law Review, pp. 294, 300, Ruiz, The Effect of Section 1951 of the Code of Civil Procedure, etc. | 8 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

EDWIN S. DOUGLAS,

*Petitioner,*

*vs.*

FAY H. DOUGLAS,

*Respondent.*

**Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.**

Petitioner Edwin S. Douglas prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, entered in the above-entitled case on October 16, 1958.

## Opinions Below.

The Opinion of the District Court of Appeal is reported at 164 A. C. A. 240, 330 P. 2d 659. It is set forth as Appendix A to this petition. The memorandum opinions of the Superior Court, County of Los Angeles, State of California, are not reported. They are set forth as Appendix B and Appendix C to this petition.

## Jurisdiction.

The judgment of the District Court of Appeal was entered on October 16, 1958. A timely petition for rehearing was filed by petitioner on October 30, 1958. The petition for rehearing was denied by the District Court of Appeal on November 13, 1958. Petitioner filed a timely petition for hearing in the California Supreme Court on November 24, 1958. The petition for hearing was denied by the California Supreme Court on December 10, 1958. On March 4, 1959, Mr. Justice Douglas signed an order extending the time to file a petition for certiorari to and including March 31, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

## Treaty Involved.

The pertinent portions of the Status of Aliens Treaty, 46 Stat. 2753, 2754, are as follows:

"Article 2

"'Foreigners are subject as are nationals to local jurisdiction and laws, due consideration being given to the limitations expressed in conventions and treaties.'"

"Article 5

"States should extend to foreigners, domiciled or in transit through their territory, all individual guaranties extended to their own nationals, and the enjoyment of essential civil rights without detriment, as regards foreigners, to legal provisions governing the scope of and usages for the exercise of said rights and guaranties."

## Statement.

Petitioner Edwin S. Douglas and respondent Fay H. Douglas were married in 1941 and separated in 1944. On April 28, 1944, petitioner filed an action for divorce against respondent in the Superior Court, Los Angeles County, State of California, alleging extreme cruelty. Respondent filed an answer and cross-complaint for separate maintenance. On October 30, 1944, the Superior Court entered an order directing petitioner to pay respondent support money *pendente lite*, in the sum of $250 per month commencing November 15, 1944. Petitioner made the prescribed support payments until February, 1946.

On March 14, 1945, the Civil Court of First Instance, Bravos District, City of Juarez, State of Chihuahua, Mexico, granted a final decree of divorce in a proceeding instituted by petitioner Edwin S. Douglas against Fay H. Douglas [Resp. Ex. B].[1] The Mexican court decreed:

> "Decree of divorce by way of final judgment and its appertaining attributes is hereby granted dissolving the marriage between Edwin S. Douglas and Fay Howard Douglas . . ." [*ibid.*].[2]

Respondent Fay H. Douglas was personally served on February 10, 1945, in Altadena, California, but defaulted in the divorce proceedings [*ibid.*]. The validity of the

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[1]Unless specific citations are given, the facts are as stated in the opinions below.

[2]A certified copy of the Mexican divorce decree in the original Spanish was offered in evidence by petitioner in the trial court and marked for identification as Respondent's Exhibit A. A certified English translation of the Mexican decree was also offered in evidence by petitioner and marked for identification as Respondent's Exhibit B. Both exhibits are part of the certified record accompanying this petition.

Mexican divorce decree was not questioned by the District Court of Appeal nor by the Superior Court below [Appendix A, p. 6; Appendix B, p. 14]. Petitioner married his present wife on March 28, 1945.

On June 10, 1949, petitioner filed an action and obtained a judgment of divorce from respondent in the Eighth District Court of the County of Clark, State of Nevada. Respondent made a special appearance in the Nevada divorce proceeding. No appeal was taken from the Nevada judgment.

In 1956, respondent filed a notice of motion in the Los Angeles Superior Court seeking the issuance of a writ of execution to enforce the *pendente lite* support order of October 30, 1944 [Clk. Tr. 2].[3] Respondent asked for a writ of execution for the aggregate sum of support payments of $250 per month from October 30, 1944, to July 7, 1949, or a total of $10,250, plus interest in the sum of $5,777.90, an aggregate total of $16,027.90 [Clk. Tr. 2].

Petitioner objected to the motion for writ of execution on the ground, among others,[4] that the Mexican divorce decree of March 14, 1945, terminated respondent's right to further *pendente lite* support payments [Clk. Tr. 16].

On December 17, 1956, the Superior Court entered an order granting respondent's motion for the issuance of a writ of execution in the sum of $15,928.54, representing the sum of $150 due March 1, 1946, and the sum of $250 accruing each and every month thereafter, to and including

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[3]"Clk. Tr." is used to designate the Clerk's Transcript which is a part of the certified record accompanying this petition.

[4]The other grounds raised no federal question.

June 10, 1949,[5] plus the sum of $6,203.54 as interest to December 17, 1956 [Clk. Tr. 42].

On appeal, the District Court of Appeal, Second Appellate District, affirmed the order. The District Court of Appeal rejected petitioner's contention that the Mexican judgment of divorce had the effect of terminating respondent's right to further support payments *pendente lite*. The court held that the Nevada divorce entered in June, 1949, not the Mexican divorce entered in March, 1945, effectively terminated the support payments under the *pendente lite* order [Appendix A, p. 13]. In doing so, the court did not question the validity of the Mexican divorce. It reasoned, by an implausible application of estoppel principles, that the Nevada decree was a conclusive determination that the parties were husband and wife from the date of their marriage to the time of the entry of the Nevada decree [Appendix A, p. 6].

In his petition for hearing in the California Supreme Court, petitioner again urged that the Mexican divorce should be given the effect of terminating the *pendente lite* support payments (Pet. for Hear., p. 10 *et seq.*).

## Reasons for Granting the Writ.

I. The California District Court of Appeal has decided an important question of the effect of a Federal Treaty which has not been, but should be, determined by this Court.

II. The California District Court of Appeal has decided an important question relating to the effect of a Federal Treaty in such a way as to nullify the force and effect of the Treaty.

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[5]June 10, 1949, is the date of the Nevada divorce decree.

I.

**The California District Court of Appeal Has Decided an Important Question of the Effect of a Federal Treaty Which Has Not Been, but Should Be, Determined by This Court.**

In 1930, the Senate ratified the Status of Aliens Treaty, and it was proclaimed, June 6, 1930. (46 Stat. 2753.) The same treaty was ratified by Mexico on March 28, 1931.[5a] The treaty deals with the rights of citizens of signatory nations while within the jurisdiction of other signatory nations. Article 2 of the treaty provides:

> "Foreigners are subject as are nationals to local jurisdiction and laws, due consideration being given to the limitations expressed on conventions and treaties" (46 Stat. 2754).

Article 5 of the treaty provides:

> "States should extend to foreigners, domiciled or in transit through their territory, all individual guaranties extended to their own nationals, and the enjoyment of essential civil rights without detriment, as regards foreigners, to legal provisions governing the scope of and usages for the exercise of said rights and guaranties" (46 Stat. 2754).

The question presented is whether an American citizen who establishes residence in Mexico and obtains a valid divorce in a Mexican court of competent jurisdiction is entitled to have the Mexican divorce decree recognized by courts in the United States.

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[5a] Counsel for petitioner was so advised by the Chief of the General Legal Division of the Organization of American States (Pan American Union).

Treaties are, of course, the supreme law of the land and binding on state courts. The Constitution provides that:

> ". . . [A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U. S. Const., Art. VI, cl. 2.)

There would appear to be little question that the treaty-making power granted to the Federal Government by the Constitution includes the power to regulate by treaty the subject of migratory divorces. (*Cf., Missouri v. Holland*, 252 U. S. 416.)

The Status of Aliens Treaty subjects Americans to "local jurisdiction and laws" while in Mexico. Americans in Mexico must, as a consequence thereof, submit to the jurisdiction of the Mexican courts. If the treaty is to have any substance, it must mean that a judgment entered by a Mexican court with jurisdiction to affect the legal relationships of Americans is binding on American state courts. Otherwise, a judgment entered by a Mexican court pursuant to the force of the treaty could easily be vitiated by collateral attack back home in a state court. To give a state court the power to nullify the effect of the Mexican decree would be the equivalent of giving the state court the power to nullify the effect of the treaty. It is submitted, therefore, that a judgment entered by a Mexican court with jurisdictional power pursuant to the treaty must be accorded at least as much recognition as a judgment of a sister state under the Full Faith and Credit Clause (U. S. Const., Art. IV, Sec. 1). Anything less would make a sham of the treaty.

Under Full Faith and Credit principles, the divorce decree of the Civil Court of Bravos District, State of Chihuahua, would be entitled to recognition by the California courts, at least in the absence of a judicial determination that the Mexican court lacked jurisdiction to dissolve the marriage. (*Williams v. North Carolina*, I, 317 U. S. 287; *Williams v. North Carolina*, II, 325 U. S. 226.) No such determination was made by the California courts below. To the contrary, the validity of the Mexican decree was not questioned by the District Court of Appeal or the Superior Court [Appendix A, p. 6; Appendix B, p. 14].

The question of the status of Mexican divorce decrees obtained by Americans is of considerable importance and should be determined by this Court. That many Americans seek divorces in Mexico is a matter of common knowledge. (And see Sumner, *Effect in California of Mexican Divorces*, 33 JOUR. OF STATE BAR OF CALIF. 15, 20; Ruiz, *The Effect of Section 1915 of the Code of Civil Procedure on Migratory Divorces Procured in Foreign Countries*, 13 So. CAL. L. REV. 294, 300.)

II.

**The California District Court of Appeal Has Decided an Important Question Relating to the Effect of a Federal Treaty in Such a Way as to Nullify the Force and Effect of the Treaty.**

If it is established that Mexican divorce decrees obtained by Americans have the same binding effect as divorce decrees of sister states under the Full Faith and Credit Clause, the question arises whether the California courts have failed to give proper effect to the Mexican decree obtained by petitioner.

It is the law of California that a *pendente lite* support order entered in a separate maintenance action does not

survive divorce—even a divorce granted by a foreign court without personal jurisdiction over the wife.[6] (*DeYoung v. DeYoung*, 27 Cal. 2d 521, 165 P. 2d 457; *Cardinale v. Cardinale*, 8 Cal. 2d 762, 68 P. 2d 351.) The rationale of this rule was stated in *DeYoung v. DeYoung* in which the Supreme Court held that a Mexican divorce was a valid defense to an action for separate maintenance even though the Mexican court had no personal jurisdiction over the wife:

> "Separate maintenance differs from alimony in that it presupposes a continuing marital status." (27 Cal. 2d at 528, 165 P. 2d at 460 (concurring opinion).)

Since it is the law of California that a *pendente lite* support order does not survive divorce, the efficacy of the 1945 Mexican divorce decree in California is a federal question that is properly determinable by this Court. (*Esenwein v. Pennsylvania*, 325 U. S. 279, 280; *cf., Sutton v. Leib*, 342 U. S. 402, 407.) Such cases as *Vanderbilt v. Vanderbilt*, 354 U. S. 416, and *Estin v. Estin*, 334 U. S. 541, involve states where the law is that the wife's support rights survive *ex parte* foreign divorces and are, therefore, distinguishable.

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[6]The California District Court of Appeal below rejected respondent Fay H. Douglas' argument on cross appeal that the support order should even survive the Nevada divorce decree entered June 10, 1949 [Appendix A, p. 13]. In doing so, the court suggested by way of dictum that the Mexican divorce decree could not effectively terminate the pre-existing *pendente lite* support order because the Mexican court had no personal jurisdiction over respondent [Appendix A, p. 12]. This dictum is apparently based upon a misreading of *Lewis v. Lewis*, 49 Cal. 2d 389, 317 P. 2d 987, in which the California Supreme Court, *in applying the law of Illinois*, held that a foreign divorce decree entered without personal jurisdiction over the wife did not terminate an Illinois support order. The Supreme Court in *Lewis v. Lewis* acknowledged that *DeYoung v. DeYoung* and *Cardinale v. Cardinale* as California case law were not in point. (49 Cal. 2d at 393, 394, 317 P. 2d at 990, 991.)

Petitioner contends that the effect of the Mexican divorce decree was to dissolve the marriage of petitioner and respondent. Their status as man and wife was terminated at that time. Once respondent's status as petitioner's wife was effectively terminated, as it was by the Mexican decree, respondent had no further right to temporary support payments under the 1944 separate maintenance order. (*DeYoung v. DeYoung, supra; Cardinale v. Cardinale, supra.*)

And once their marriage status was terminated by the Mexican decree, petitioner and respondent could not be adjudicated to be man and wife after that time without nullifying the effect of the Mexican decree. Yet the California courts below effectively reinstated the marriage status of petitioner and respondent after the date of the Mexican decree. This was accomplished by a strained application of estoppel principles. The court reasoned that the 1949 Nevada divorce decree was a conclusive determination of the status of the parties as husband and wife from the date of marriage to the effective date of the Nevada decree [Appendix A, p. 6; Appendix B, p. 15]. In short, petitioner was penalized by the California courts for seeking a second divorce, apparently not an uncommon practice in light of the uncertainty surrounding the legal effect of migratory divorces. (See *Rediker v. Rediker*, 35 Cal. 2d 796, 803, 221 P. 2d 1, 5; Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930, 1003-1004.)

The force of Federal law cannot be avoided by a state court on a point of state law of little if any substance. (See *Durley v. Mayo*, 351 U. S. 277, 281-282; *Williams v. Kaiser*, 327 U. S. 471, 478.) If, as petitioner contends, the 1945 Mexican divorce is entitled to the respect of the state courts, its effect cannot be so easily avoided. The

1949 Nevada decree, as a decree of divorce, had the effect of confirming the 1945 Mexican decree—that petitioner and respondent were no longer man and wife. To reason, as the courts below did, that the Nevada decree of divorce conclusively determined the status of the parties as man and wife, is to confuse the result—divorce—with something the Nevada court assumed had existed between the parties at some prior time—marriage. And to permit the California court to use such reasoning to nullify the effect of the 1945 Mexican divorce decree is to permit the force of Federal law to give way to sophistry.

The Mexican decree of March 14, 1945, terminated the status of petitioner Edwin S. Douglas and respondent Fay H. Douglas as man and wife. The Status of Aliens Treaty makes the Mexican decree binding on American courts. Neither the California courts nor the Nevada courts could nullify the effect of the Mexican decree—at least in the absence of a determination that the Mexican court lacked the requisite jurisdiction (*Williams v. North Carolina*, II, 325 U. S. 226), a determination that was not made in this case. But this is precisely the effect of the California court's determination that the Nevada divorce decree was a conclusive determination of the status of the parties as man and wife until the time of the decree.

The Mexican divorce decree should have been given the effect of terminating the right of respondent to further payments under the California *pendente lite* support order, which is the effect any other foreign divorce decree would have been given in California. (*DeYoung v. DeYoung*, 27 Cal. 2d 521, 165 P. 2d 457; *Cardinale v. Cardinale*, 8 Cal. 2d 762, 68 P. 2d 351.)

## APPENDIX A.

### Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Edwin S. Douglas, Plaintiff, Cross-defendant, and Appellant, and Respondent, vs. Fay H. Douglas, Defendant, Cross-complainant and Respondent, and Appellant. Civil No. 22673.

Filed October 16, 1958.

Appeals from an order of the Superior Court of Los Angeles County, Emil Gumpert, Judge.

For Plaintiff, Cross-defendant, and Appellant: Bonpane & Dillon; Manuel Ruiz, Jr.

For Defendant, Cross-complainant and Respondent: Jerrell Babb.

After the five-year period authorizing the issuance of execution under Section 681 of the Code of Civil Procedure had expired, respondent, on March 29, 1955, filed in the superior court, a notice of motion, petitioning said court to nevertheless, issue execution pursuant to the provisions of Section 685 of the Code of Civil Procedure. The record reveals that said motion was predicated upon the following factual background. Appellant and respondent were married in 1941 and separated in 1944. On April 28th of that year, appellant filed an action for divorce against respondent on the ground of extreme cruelty. On June 1, 1944, respondent filed an answer and cross-complaint for separate maintenance against appellant. On October 30, 1944, the superior court made its order pursuant to the prayer of said cross-complaint, directing appellant to pay respondent support money *pendente lite,*

in the sum of $250.00 per month commencing November 15, 1944. Said payments were made by appellant to and including the month of February, 1946.

There was testimony by appellant that from February, 1946 to July, 1949 he was absent from the state of California and spent "most of the time in New Rochelle, New York." Appellant, however, contends that during this period he made frequent trips to Los Angeles to appear in court in connection with pending litigation between him and respondent, the trial of which was continuously postponed due to "dilatory tactics" of respondent. In her affidavit respondent asserts that during these trips to Los Angeles, appellant "kept his whereabouts concealed" from her and that she could not, "with the exercise of due diligence, ascertain same until approximately the month of January, 1953, or for a total of seven years" that she diligently sought at all times to ascertain appellant's whereabouts; and that she procured the issuance of writs of execution, all of which were returned unsatisfied. It further appears that in 1951, on the occasion of one of appellant's visits to Los Angeles, respondent, through the office of the district attorney, instituted criminal proceedings against him for failure to provide for a minor child, allegedly the son of appellant. In his affidavits, appellant averred that in the early part of January, 1953, he returned to reside permanently in the city of Los Angeles since which time he has continuously lived in Los Angeles; that since the month of January, 1953, "appellant has been continuously in the employ of Telegraph Delivery Service; and the office of said Telegraph Delivery Service was conveniently located in a downtown building at 354 South Spring Street, Los Angeles, California.

"In the fall of 1955 said Telegraph Delivery Service moved its office to Beverly Hills, California, and is located at 292 La Cienega Boulevard, Beverly Hills, California. Respondent has been always aware of the location and exact address of appellant's employment, and on numerous occasions, during the years 1954, 1955 and 1956, she caused appellant to be served with lawsuits, papers and orders to show cause. By reason of said lawsuits and numerous proceedings thereunder it became necessary for appellant to come into court any number of times throughout the year 1954 to attend court hearings of considerable length, conducted on various dates in the Superior Court before Judge Richards, Judge Walker, Judge McCoy and other judges of the Superior Court, which culminated in the dismissal in September, 1954, of fourteen Superior Court lawsuits filed by respondent, from time to time, in the last 10 or 12 years. Said lawsuits and proceedings were entirely unrelated to any attempt, under Sections 681 or 685, Code of Civil Procedure, to collect back payments allegedly due her.

"At no time whatsoever, within an entire period of ten years, between February, 1946, and March 29, 1956, the date of the filing of notice of motion for writ of execution under Section 685, Code of Civil Procedure, did respondent take any action to secure a writ of execution in back payments, under Section 681, Code of Civil Procedure, although respondent knew, from February, 1946, at all time, the whereabouts of appellant, and saw him on his several trips back to Los Angeles, and knew that he was locally employed since January, 1953, and yet waited until March, 1956, to file her motion for writ of execution."

Appellant further asserts that on March 14, 1945, he obtained a valid judgment of divorce from respondent in

Mexico. That on March 28, 1945 he married his present wife. That thereafter, in 1951, respondent filed an action in the Superior Court of Los Angeles County, attacking the validity of said Mexican divorce, but, in September, 1954, she dismissed the action with prejudice. Appellant therefore, contends that the right of respondent to any further allowance of support *pendente lite* in the aforesaid separate maintenance action was terminated on March 14, 1945 by the Mexican divorce.

It might here be noted that on July 5, 1949, the Superior Court of Los Angeles County, on its own motion, dismissed appellant's divorce action pursuant to the provisions of Section 583 of the Code of Civil Procedure, and on July 7, 1949 the same court dismissed respondent's cross-complaint, upon which the order for support money *pendente lite*, here under consideration, was based.

On June 10, 1949, appellant filed an action and obtained a judgment of divorce from respondent in the Eighth District Court of the County of Clark, State of Nevada. Subsequently, respondent made a special appearance in said Nevada court wherein she challenged the validity of the judgment of divorce on the ground of fraud and lack of jurisdiction. The motion was denied, no appeal was taken therefrom, and the judgment has become final.

On March 29, 1946 respondent filed, in the Superior Court of Los Angeles County, her motion asking the court to issue a writ of execution pursuant to the terms of Section 685 of the Code of Civil Procedure after the expiration of the five-year period provided by Section 681 of the same code. Respondent's motion sought an execution and a judgment for accrued support payments allegedly due her from February, 1946 to July, 1949 under the *pendente lite* order granted on October 30, 1944, in her aforesaid separate maintenance action.

Appellant filed objections to respondent's motion, supported by affidavits, on to grounds:

(1) That appellant's judgment of divorce, obtained in Mexico on March 14, 1945, terminated respondent's right to further *pendente lite* support payments in her separate maintenance action;

(2) That in any event, respondent had no standing in court because she had failed to exercise the due and necessary diligence required by law, and by the provisions of Section 685, Code of Civil Procedure, on a request for the issuance of execution after the expiration of the five-year period provided by Section 681, Code of Civil Procedure.

The court granted respondent's motion and ordered the issuance of a writ of execution under Section 685 of the Code of Civil Procedure against appellant for the sum of $15,928.54 representing payments due from appellant to respondent from March 1, 1946 to and including June 10, 1949 (the date of the aforesaid Nevada divorce), together with interest in the sum of $6,203.54. From such order, appellant prosecutes this appeal.

As his first ground for reversal, appellant earnestly urges that the trial court committed prejudicial error in holding that the Mexican divorce decree entered in March, 1945 was not controlling to terminate the support payments under the aforesaid *pendente lite* order for separate maintenance and that the date of the Nevada divorce, entered in June, 1949 constituted the effective date of termination.

Under the facts and circumstances present in the controversy now engaging our attention, we are satisfied that the learned trial judge correctly disposed of appellant's contention. We therefore adopt as part of this

opinion the following language taken from the "memorandum" filed by the judge of the court below when the cause was decided by him:

"We need not concern ourselves here with the validity of the Mexican decree. Subsequent to its entry, Mr. Douglas secured a second divorce from Mrs. Douglas, this time in Nevada. (Parenthetically, in other proceedings in this action he asserts the validity of and relies upon the Nevada judgment.) The latter decree was a conclusive determination of the status of the parties as husband and wife from the date of the marriage to the dissolution of that relation by the Nevada court. (*Estate of Lee*, 200 Cal. 310, 314.) It being the later of the two adjudications, it is controlling. Mr. Douglas by his proceedings in Nevada waived his right to assert the benefit of the Mexican decree (Dillard v. McKnight, 34 Cal. 2d 209, 219; California Bank v. Traeger, 215 Cal. 346, 351; 29 Cal. Jur. 2d, pages 174 and 258).

"In support of the Mexican judgment, counsel for Mr. Douglas rely upon a dismissal 'with prejudice' by Mrs. Douglas on September 14, 1954, of a California action directly attacking it. This dismissal, they assert, was effective as a retraxit and was res judicata on the issue of the validity of the Mexican decree. (Citing Gagnon Co. v. Nevada Desert Inn, 45 Cal. 2d 448.) The Court is thus called upon in effect to declare an estoppel upon an estoppel upon an estoppel. There are two answers to the above: (a) The California action attacked both the Mexican and the Nevada judgments. If the dismissal operated as an adjudication, it determined the validity of both decrees, and as above indicated, the later of the two must control as to the status of the parties; (b) The record here shows a fourth adjudication. After

such dismissal 'with prejudice' this court in this very action made a final order establishing the validity of the Nevada judgment. (See the November 10, 1954, order of Judge Philbrick McCoy.)

"The Nevada judgment, if valid, terminated ipso instante the award of temporary maintenance herein. (Chirgwin v. Chirgwin, 26 Cal. App. 2d 506; 28 A. L. R. 2d 1402; 42 C. J. S. 274.) Mrs. Douglas attacked the jurisdiction of the Nevada Court in that forum. She is thus foreclosed from attacking it here. (Tompkins v. Tompkins, 89 Cal. App. 2d 243, 247-8; and state and federal cases there cited. Additionally, as heretofore stated, the Nevada decree was found valid by a final order of this court on November 10, 1954. Accordingly, any recovery herein must be based on amounts accruing prior to June 10, 1949, the date of the Nevada judgment."

We are not impressed with appellant's argument that because divorce laws are established for "public reasons" (Civil Code, Section 3513), and the state has an interest in the marital status, its continuance and its dissolution, the provisions of his Mexican divorce could not be waived by him. When appellant sought the aid of the Nevada court in seeking dissolution of his marriage he represented to that court that respondent herein was his lawful wife. He is an attorney at law, and whatever may have been his reasons, it is manifest he did not rely upon the validity of his Mexican divorce when he invoked the powers of the Nevada court to dissolve the bonds of matrimony existing between him and respondent herein. It would be a mockery of laws governing marriage and divorce and amount to a trifling with judicial process and tribunals if a person might obtain a series of divorces in various jurisdictions and use one of them when that particular decree might, in his opinion,

best serve his purpose or interest. Law and good morals should be one and inseparable. The trial court was correct in holding that the Nevada decree having been found valid by a final order of the courts of this state, was the proper one to be used in determining when appellant was relieved of his obligations under the *pendente lite* order for support herein.

In an opinion this day filed (Douglas v. Douglas, *ante* p. 235) we affirmed an order of the Superior Court of Los Angeles County made March 5, 1957 vacating an *ex parte* judgment of said court and a writ of execution obtained by respondent herein against appellant herein to collect support money allegedly due the former under the aforesaid *pendente lite* order of October 30, 1944 on appellant wife's separate maintenance cross-complaint, from July 20, 1951 to July 20, 1956. In the case just cited (*ante* p. 235) we held that the right of respondent herein to support money under her cross-complaint terminated with the dismissal of that pleading by the court below on July 7, 1949. However, since the order now engaging our attention concerns alleged unpaid *pendente lite* support money payments from March 1, 1946 to *June 10, 1949*, such order is unaffected by our holding in Douglas v. Douglas, *ante* p. 235 that the right of respondent herein to such payments did not terminate until *July 7, 1949*.

We come now to appellant's final contention that the court abused its discretion in granting respondent's motion for issuance of execution under Section 685 of the Code of Civil Procedure.

Without question, appellant introduced evidence that he was in Los Angeles and employed by Telegraph Delivery Service in January, 1953, and thereafter. That respond-

ent knew of appellant's residence in Los Angeles and served him with a series of legal documents during this period. That during the time he lived in New York, appellant made frequent trips to Los Angeles. That on one of such occasions, respondent took advantage of appellant's presence in Los Angeles to have him arrested through the district attorney's office for failure to provide for a child who respondent insisted was appellant's son.

However, these assertions by appellant were challenged and contradicted by respondent in her supporting affidavits and oral testimony at the hearing. We have heretofore narrated in some detail the contents of respondent's supporting affidavit and shall not here repeat them. Suffice it to say that there was presented to the judge of the court below a distinct conflict on the question of whether respondent had set forth good and sufficient reasons for her failure to proceed in compliance with the provisions of Section 681 of the Code of Civil Procedure.

The rule is well settled that the discretionary power of a court in proceedings of this character will not be disturbed unless a clear abuse of discretion is made to appear. Even though the correctness of the ruling may be doubted, nevertheless, an appellate tribunal is not warranted in substituting its own opinion, for to do so would divest the trier of facts of that discretionary power primarily reposed in him. In the instant case the trial court had before it not only the affidavits of the parties, but had the opportunity to hear their oral testimony, to observe their demeanor on the witness stand, their candor or lack of candor, and to form an opinion of the verity of both the oral testimony and the averments in their respective affidavits. The prerogatives of an appellate court on appeal when reviewing the sufficiency of the evidence to support

the conclusion arrived at by the trial court is thus stated in Estate of Bristol, 23 Cal. 2d 221, 223, 224:

"The rule as to our province is: 'In reviewing the evidence, . . . all conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary . . . principal of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court,' Crawford v. Southern Pacific, 3 Cal. 2d 427). "The rule quoted is as applicable in reviewing the findings of a judge, as it is when considering a jury's verdict. The critical word in the definition is '*substantial*'; it is a door which can lead as readily to abuse as to practical or enlightened justice. It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover whether such doubt or conflict exists, the court should be realistic and practical. . . ."

(See also Jackson v. de Benedetti, 39 Cal. App. 2d 574, 579.)

As to his appraisal of the intrinsic value of the conflicting evidence, and the credibility of the affidavits and testimony of appellant and respondent herein, the trial judge in his "memorandum," had this to say:

"#2. The Court is completely satisfied that Mrs. Douglas has shown due and reasonable diligence in pursuing her statutory remedies. A review of the voluminous evidence submitted to and carefully considered by the Court is not necessary to this memo. Suffice it to say that Mr. Douglas (appellant), by every means at his disposal (including the absenting of himself from California and the transfer of his assets to his children), has sought to avoid, and has successfully avoided, the payment of the amounts accruing herein. The evidence discloses numerous efforts on the part of Mrs. Douglas to uncover assets of Mr. Douglas and to enforce payment of sums owing her. The Court is convinced that the issuance of writs of execution during the past years would have been productive of no recovery. . . ."

"#3. . . . The Court is unwilling to accept Mr. Douglas' bare and unsupported statements regarding payments totaling $8,000.00. His testimony and witness demeanor at best, affords no basis for sustaining any such claim, and the Court does not accept it . . ."

In view of the prevailing rule of law as announced in Estate of Bristol, *supra*, pp. 223, 224, we cannot hold that the conclusion arrived at in the trial court that respondent exercised the due diligence required by Section 685 of the Code of Civil Procedure in this case is unsupported by any substantial evidence.

We are inclined to the view that apropos of the case at bar is the following quotation from Demens v. Huene, 89 Cal. App. 748, 753, which was quoted with approval in

Atkinson v. Atkinson, 35 Cal. App. 2d 705, 708, and in Troendle v. Clinch, 74 Cal. App. 2d 480, 484:

"It is the intent of the law, and it would seem the intent, as well, of good morals, that everyone being able should pay his debts. Here we find the debt ripened into a judgment. Several years go by and it is not paid. The law does not contemplate that, the time of the statute of limitations having run, the liability to pay has completely passed. The motion made in this case is provided for by law. There must, then, be something added to the mere fact of the expiration of the time and that the judgment debtors were possessed of personal property, which would move the court to deny the right given by the statute, section 685 of the Code of Civil Procedure. . . ."

## Cross Appeal.

Respondent has filed a cross appeal from that portion of the order limiting her recovery to the date of June 10, 1949 "under a theory of validity of the Nevada divorce," and also from that portion of the order denying respondent interest on the backpayments of alimony *pendente lite*, from June 10, 1949 to date of the order.

Cross-appellant relies heavily on the case of Lewis v. Lewis, 49 Cal. 2d 389, but in that case the holding was that unless the Nevada court had personal jurisdiction over the wife, it was without power to terminate a husband's obligation to provide her support as required in a pre-existing decree of another state (Lewis v. Lewis, *supra*, p. 393).

This case is therefore authority for the holding of the trial court that the Mexican divorce decree entered in March, 1945, could not effectively terminate the pre-existing *pendente lite* support order, entered by the Su-

perior Court of Los Angeles County, California, on October 30, 1944. This, for the reason that in the Mexican divorce proceeding the court had no personal jurisdiction over cross-appellant.

However, in the case at bar, as found by the trial court, cross-appellant unsuccessfully attacked the jurisdiction of the Nevada court in that forum, and thereafter the trial court herein made an order, now final, in this very action, adjudicating the validity of the Nevada decree. Whether or not the courts of California were obligated under the Full Faith and Credit Clause of the Constitution of the United States to give the Nevada decree recognition, they did so, and having jurisdiction over cross-appellant, the adjudication of the validity of the Nevada decree, was binding upon her. Therefore, it was not error to terminate the *pendente lite* support payments as of the effective date of the valid Nevada decree.

Concerning cross-appellant's final contention that the court erroneously denied her interest on the delinquent payments of support money *pendente lite* to the date of the order appealed from, the record reflects that interest was awarded on said backpayments, "from the date of accrual thereof to December 17, 1956," *which was the date of the order.*

The order appealed from is affirmed.

Each party to pay their own costs on appeal.

WHITE, *P. J.*

We concur:

FOURT, *J.*

LILLIE, *J.*

## APPENDIX B.

### Memorandum.

In the Superior Court of the State of California, in and for the County of Los Angeles.

Edwin S. Douglas, Plaintiff and Cross-defendant, vs. Fay H. Douglas, Defendant and Cross-complainant. No. D 258 063.

On this motion for an order for the issuance of a writ of execution under C. C. P. 685, Edwin S. Douglas, the responding party, makes three principal contentions, viz.:

#1. That a divorce decree procured by him in Mexico prior to the accrual of any sums for which execution is now sought, was valid, and hence ipso facto terminated as of the date thereof the allowance herein of separate maintenance.

#2. That Fay H. Douglas, the present moving party, has not met the burden cast upon her by the statute (C. C. P. 685) of establishing reasonable diligence.

#3. That he paid to Fay H. Douglas on account of sums accruing under the order for maintenance herein a total sum of $8,000.00, for a substantial portion of which he is now entitled to credit.

Each of these contentions must be resolved against Edwin S. Douglas:

#1. We need not concern ourselves here with the validity of the Mexican decree. Subsequent to its entry Mr. Douglas secured a second divorce from Mrs. Douglas, this time in Nevada. Parenthetically, in other proceedings in this action he asserts, the validity of and relies upon the Nevada judgment.) The latter decree

was a conclusive determination of the status of the parties as husband and wife from the date of the marriage to the dissolution of that relation by the Nevada court (Estate of Lee, 200 Cal. 310, 314). It being the later of the two adjudications, it is controlling. Mr. Douglas by his proceedings in Nevada waived his right to assert the benefit of the Mexican decree (Dillard v. McKnight, 34 Cal. 2d 209, 219; California Bank v. Traeger, 215 Cal. 346, 351; 29 Cal. Jur. 2d, pages 174 and 258.)

In support of the Mexican judgment, counsel for Mr. Douglas rely upon a dismissal "with prejudice" by Mrs. Douglas on September 14, 1954, of a California action directly attacking it. This dismisal, they assert, was effective as a retraxit and was *res judicata* on the issue of the validity of the Mexican decree. (Citing Gagnon Co. v. Nevada Desert Inn, 45 Cal. 2d 448.) The Court is thus called upon in effect to declare an estoppel upon an estoppel upon an estoppel. There are two answers to the above: (a) The California action attacked both the Mexican and the Nevada judgments. If the dismissal operated as an adjudication, it determined the validity of both decrees, and as above indicated, the later of the two must control as to the status of the parties; (b) The record here shows a fourth adjudication. After such dismissal "with prejudice" this court in this very action made a final order establishing the validity of the Nevada judgment. (See the November 10, 1954, order of Judge Philbrick McCoy.)

#2. The Court is completely satisfied that Mrs. Douglas has shown due and reasonable diligence in pursuant her statutory remedies. A review of the voluminous evidence submitted to and carefully con-

sidered by the Court is not necessary to this memo. Suffice it to say that Mr. Douglas, by every means at his disposal (including the absenting of himself from California and the transfer of his assets to his children), has sought to avoid, and has successfully avoided, the payment of the amounts accruing herein. The evidence discloses numerous efforts on the part of Mrs. Douglas to uncover assets of Mr. Douglas and to enforce payment of sums owing her. The Court is convinced that the issuance of writs of execution during past years would have been productive of no recovery.

#3. The Court is unwilling to accept Mr. Douglas' bare and unsupported statements regarding payments totaling $8,000.00. His testimony and witness demeanor at best affords no basis for sustaining any such claim, and the Court does not accept it. The sole documentary evidence of payments is the statement from the Court Trustee. It should be noted that the maintenance payments here involved were not ordered paid through the Court Trustee. Obviously the amounts shown on the statement of that official were for child support, for which Mr. Douglas is not here entitled to credit.

The Nevada judgment, if valid, terminated *io instante* the award of temporary maintenance herein. (Chirgwin v. Chirgwin, 26 Cal. App. 2d 506; 28 A. L. R. 2d 1402; 42 C. J. S. 274.) Mrs. Douglas attacked the jurisdiction of the Nevada Court in that forum. She is thus foreclosed from attacking it here. (Tompkins v. Tompkins, 89 Cal. App. 2d 243, 247-8, and state and federal cases there cited.) Additionally, as heretofore stated, the Nevada decree was found valid by a final order of this court on November 10, 1954. Accordingly, any recovery herein must be based on amounts accruing

prior to June 10, 1949, the date of the Nevada judgment. Mrs. Douglas concedes the receipt of all amounts accruing prior to March 1, 1946. The Court is of the opinion that all installments accruing between March 1, 1946, and June 10, 1949, other than $100.00, are unpaid, and that Mrs. Douglas is entitled to the issuance of a writ of execution for such unpaid accruals, plus interest.

Counsel for the moving party will prepare a formal order in accordance with the foregoing.

Dated December 17, 1956.

EMIL GUMPERT, *Judge.*

## APPENDIX C.

### Memorandum.

In the Superior Court of the State of California, in and for the County of Los Angeles.

Edwin S. Douglas, Plaintiff and Cross-defendant, vs. Fay H. Douglas, defendant and Cross-complainant. No. D 258 063.

The Court finds nothing in the "Petition for Rehearing" herein, nor in the arguments thereon, which either requires or justifies any modification of the order for issuance of writ of execution. However, the present application should not be finally passed upon without a reference to certain unbased assumptions contained in the moving paper.

During an informal meeting between Court and counsel, at which a possible compromise of this unhappy litigation was being explored, the Court made an observation regarding the applicable law, where affidavits are in conflict. The Court did not state or intimate that any doubt existed in its mind as to the sufficiency of the showing of due diligence on the part of Fay H. Douglas,—and no such doubt did exist or now exists.

Counsel for Edwin S. Douglas may be assured that Attorney Babb's highly improper reference to the asserted wealth of their client had no bearing whatsoever on the decision of the Court on the question of diligence or on any other issue. Prior to the Court's announcement of its decision to order execution, counsel must have concluded that such conduct was in no way prejudicial, for they made no motion either for a mistrial or for disqualification.

Particularly apropos of this case is the following quotation from Demens v. Huene, 89 Cal. App. 748, which was quoted with approval in Atkinson v. Atkinson, 35 Cal. App. 2d 705, and in Troendle v. Clinch, 74 Cal. App. 2d 480:

"It is the intent of the law, and it would seem the intent, as well, of good morals, that everyone being able should pay his debts. Here we find the debt ripened into a judgment. Several years go by and it is not paid. The law does not contemplate that, the time of the statute of limitations having run, the liability to pay has completely passed. The motion made in this case is provided for by law. There must, then, be something added to the mere fact of the expiration of the time and that the judgment debtors were possessed of personal property, which would move the court to deny the right given by the statute, section 685 of the Code of Civil Procedure. . . ."

Dated this 3rd day of January, 1957.

EMIL GUMPERT, *Judge.*